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In The
Supreme Court of the United States

DANNY RAY DUNLAP,
Petitioner,

v.

PEOPLE OF THE STATE OF MICHIGAN,
DENNIS K. STRAUB, Warden,
FRANK ELO, Warden,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Was it error to deny Certificate of Appealability?

2. Was Petitioner denied the effective assistance of trial counsel?

3. Was it error to allow a social worker to render an expert opinion?

4. Was it error to introduce hearsay evidence?

5. Was Petitioner's sentence unlawful?

6. Was Petitioner denied the effective assistance of appellate counsel?

7. Did the trial judge misconceive the evidence?

8. Was Petitioner convicted upon insufficient evidence?

9. Was the trial transcript improperly modified?

10. Was Petitioner's right to counsel violated?

11. Was Petitioner incompetent at the time of trial?

12. Was unfair and irrelevant evidence introduced?

PARTIES TO THE PROCEEDINGS

Petitioner

Danny Ray Dunlap. Petitioner is an individual and has no corporate affiliations.

Respondents

People of the State of Michigan; Dennis K. Straub, Warden; and Frank Elo, Warden.

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Danny Ray Dunlap, the petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in the above entitled case on May 2, 2000.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan, entered August 31, 1999 and is set forth in Appendix A at 1a. The District Court Order Denying Certificate of Appealability entered September 9, 1999 is set forth in Appendix B at 25a. The Order of the Court of Appeals denying the petition for rehearing is set forth in Appendix C at 37a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 2000. The jurisdiction of this Court is invoked pursuant to 28 USC § 1254.

STATUTES AND RULES INVOLVED

Amendments V, VIII and XIV of the U.S. Constitution

Rule 60(b) FRCP

STATEMENT OF CASE

Facts

The jury found Petitioner guilty of both counts of first degree criminal sexual conduct on July 6, 1988. MCL 750.520 (B); MSA 28.788(2)(1)(a) Tr. Vol. II at 112-115. Later the same day Petitioner pleaded guilty to three counts of child cruelty. MCL 750.136; MSA 28.331.

He was sentenced by the Hon. Wendy M. Baxter of Detroit Recorder's Court on July 27, 1988 to concurrent sentences of thirty (30) to sixty (60) years for the criminal sexual conduct convictions and two and a half to four years for the child cruelty convictions. (Note all factual statements herein are supported either by the record in the various courts below or in verified pleadings filed from time to time by Petitioner.)

Petitioner filed *pro se* petition for a writ of *habeas corpus* pursuant to 28 U.S.C. § 2254 alleging that he is confined in violation of his constitutional rights. In his application Petitioner challenged his convictions. Petitioner first challenged these convictions in a *habeas* application submitted in 1994. That application was dismissed without prejudice for failure to exhaust state court remedies. The transcripts of Petitioner's trial, guilty plea, and sentencing hearing are found in the records of that 1994 case, *Danny Dunlap v William Grant*, 94-CV-70643-DT.

Petitioner was convicted of having sexual intercourse with his then thirteen year old daughter, D.D., and having fellatio performed upon him by his then five year old daughter, V.D.

D.D. testified that Petitioner then climbed on top of her and put his penis inside her vagina. Petitioner had intercourse with her briefly, but stopped, got up, and left the room abruptly after her mother opened the bedroom door and entered the room. D.D. further testified that her mother told Petitioner to get off her and the Petitioner replied that she was seeing things. D.D. also testified at trial that Petitioner had intercourse with her before on several other occasions.

D.D. also testified that on Christmas Day 1987 she saw her sister V.D. perform oral sex on Petitioner. D.D. testified that she heard her sister V.D. giggling under the covers. When D.D. pulled the covers down, she saw V.D. licking at her father's penis. [See below for the claimed error regarding this portion of the trial transcript.]

Defense counsel impeached D.D.'s trial testimony that Petitioner had intercourse with her several times with her preliminary examination testimony that the December 19 incident had been the first and only time and Defense counsel elicited an admission from D.D. that, prior to the trial, she had discussed her testimony with the prosecutor and had come into a court room and rehearsed her testimony in a witness stand.

Despite repeated questioning V.D. testified that she could not remember what her father had asked her to do that day. She denied that anything had happened between her father and her on Christmas day.

Police officer Laura Moore testified that V.D. showed Officer Moore her big toe. The toenail had been partially torn off. Over a defense hearsay objection, Officer Moore testified that V.D. told her that her father had torn her big toenail off with a pair of pliers. Tr. Vol. II at 6. The trial

judge overruled defendant's hearsay objection, initially invoking the excited utterance-rule, Tr. Vol. I at 184-85, but later admitting this hearsay testimony as a statement of the declarant's then existing physical or emotional condition. Tr. Vol. II at 6.

Officer Moore testified that V.D. told her she had recently spoken to her father on the telephone and that Petitioner had "told her if she told what had happened that he'd rip her toenail off again." Tr. Vol. II at 9.

Procedural History

Petitioner appealed as of right his convictions and sentences. The Michigan Court of Appeal affirmed the judgment on Petitioner's first-degree criminal sexual conduct convictions and sentences and his convictions and sentences for child cruelty. Petitioner raised the following issues in his appeal of right.

First, he challenged the admission of V.D.'s hearsay statements about the injury to her big toe and Petitioner's threat to re-injure the toe. The Court of Appeals found that the first statement concerning the big toe injury was properly admitted as a statement concerning an existing mental, emotional, or physical condition under M.R.E. 803(2). The statement concerning Petitioner's threat to re-injure the toe was not objected to at trial and the appellate court found that no manifest injustice would result from not considering this issue.

Second, Petitioner contended that D.D.'s hearsay statements related by social worker Zoss were improperly admitted. The appellate court found that defendant either failed to object, or failed to state the specific grounds for

objecting to this testimony at trial. The appellate court further found that this failure precluded appellate review and that no manifest injustice would result from not considering this issue.

Third, Petitioner contended that no evidence of penetration was presented concerning the count involving V.D. The appellate court found otherwise.

Fourth, Petitioner challenged the testimony of Robin Zoss concerning the rape trauma syndrome and her opinion testimony that D.D.'s symptoms were consistent with those of a person who had been sexually abused. The appellate court found that this claimed error was not properly before the court because the defense had not objected to this testimony at trial.

Fifth, Petitioner attacked his thirty to sixty year sentence as improper under Michigan law because it was a sentence he could not reasonably be expected to be able to serve. The appellate court denied this claim, noting that Petitioner was thirty-nine at sentencing and stating that there was no reason he would not be able to serve the thirty-year minimum sentence.

Sixth, Petitioner attacked his convictions of child cruelty as arising under an unconstitutionally vague and overbroad statute. The appellate court rejected this claim on the merits.

The Michigan Supreme Court denied Petitioner's delayed application for leave to appeal the denial of his appeal of right.

Petitioner next filed a petition for a writ of habeas corpus in this Court on February 18, 1994. That petition

raised the same issues that had been presented in his appeal of right, plus two additional, unexhausted issues. The petition was therefore dismissed without prejudice for failure to exhaust state court remedies.

On or about April 3, 1995 Petitioner filed a motion for relief from judgment in the trial court. The trial court denied this motion. Petitioner, acting through retained counsel, subsequently appealed the denial of this motion to the Michigan Court of Appeals. Petitioner's appeal asserted that Petitioner's first appellate counsel had been ineffective for failing to argue that ineffective assistance of trial counsel had caused the various procedural defaults that the Michigan Court of Appeals had noted in its denial of petitioner's appeal of right. Petitioner also challenged his thirty to sixty year sentence as disproportionate under *People v Milbourn,* 435 Mich. 630 (1990). The Michigan Court of Appeals denied Petitioner's delayed application for leave to appeal for failure to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D)

On or about December 17, 1997 Petitioner filed a pro per delayed application for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court informed Petitioner by letter that it would not accept his submission for filing, because it had been filed more than fifty-six days after the date of the Court of Appeals decision. M.C.R. 7.302(C)(3). Having exhausted his state remedies petitioner sought a federal writ of habeas corpus pursuant to 28 U.S.C. § 2254. This relief was denied and Petitioner subsequently filed a number of appeals to the U.S. Court of Appeals which were finally denied May 2, 2000.

REASONS FOR GRANTING THE WRIT

I

Issuance of Certificate of Appealability

The U.S. District Court for the Eastern District of Michigan denied issuance of such certificate by order of September 23, 1999.

Issuance of certificate of probable cause is jurisdictional prerequisite to appellate review from final order in federal habeas proceeding by state prisoner. 28 U.S.C. § 2253.

Lynch v Blodgett, 999 F.2d 401 (9th Cir. 1993) held that to permit state prisoner's habeas appeal to proceed from denial of Rule 60(b) motion for relief from judgment without issuing certificate of probable cause circumvents obvious purpose of federal statute which is creation of discretionary appellate review for habeas petition filed by state prisoners.

Denial of such certificate in the instant case precluded Petitioner from review by the U.S. Court of Appeals and thus deprived him of his basic rights of due process under Amendment V of the U.S. Constitution.

II

Petitioner Was Denied the Effective Assistance of Trial Counsel

a. Trial counsel failed to adequately object to prejudicial hearsay and opinion evidence which was improperly admitted and deprived Petitioner of a fair trial.

b. No objection was made by defense counsel regarding the modified transcripts (see below) and leading the trial judge to misstate or mischaracterize this testimony of D.D., which was the only testimony supporting the penetration element of Count II.

c. Failing to object to testimony by Officer Laura Moore about Petitioner's threat to re-injure V.D.'s toe.

e. Failing to timely and properly object to Robin Zoss's hearsay testimony relating D.D.'s statement that Petitioner had sexual intercourse with her. (Details of this testimony is set forth below.)

f. Failing to object to Robin Zoss's opinion testimony.

g. Failing to use a letter written by D.D. to challenge her credibility. The letter, which is dated February 8, 1988, states that D.D. loves and misses her father, hopes to return to his custody, and that the police threatened her and V.D. There is no evidence that the petitioner ever influenced D.D. not to testify nor is there is evidence that the petitioner told D.D. to write such a letter.

h. Failing to object to social worker Zoss's testimony concerning D.D.'s symptoms or behavioral problems or their possible relationship to having been sexually abused. After this testimony was given, defense counsel objected as an improper report of Zoss's treatment. This objection was overruled. In its denial of Petitioner's appeal of right the Michigan Court of Appeals found that the defense had failed to object or failed to state the specific grounds for objection. The court ruled that failure to consider the issue would not result in a manifest injustice. Failure to object to

this testimony constituted ineffective assistance of trial counsel.

In *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court set forth the test to be used:

In reviewing federal claims of ineffective assistance of counsel. First, defendant must show that counsel's performance was deficient. This requires that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant under the Sixth Amendment.

> "Second, the deficiency must be prejudicial to the defendant. An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment if the error had no effect on the judgment. 466 U.S. at 691-692. The defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Id. 466 U.S. at 695.

Appellant was subject to ineffective assistance of counsel when counsel failed to raise the foregoing issues in the trial court.

Counsel's errors denied Defendant effective "counsel" as guaranteed by the Sixth Amendment. *Strickland* held that the test is reasonably effective assistance and a reasonable probability of different result with effective assistance, the latter of which is present here.

The Sixth Amendment right to counsel requires not only that a person accused of a crime have the assistance of counsel for his or her defense, but also that such assistance be "effective." *U.S. v Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) That is, representation that is within the range of competence demanded of attorneys in criminal cases generally.

III

It Was Error to Allow a Social Worker to Render an Expert Opinion

When asked by the prosecutor whether "any normal troubled teenager could exhibit these symptoms as well," clinical social worker Robin Zoss answered:

> "They might exhibit one or two but not all of them, particularly not the self abuse symptoms." Tr. Vol. II at 46. Asked if "they," *i.e.*, normal troubled teens, would exhibit such symptoms to the extent D.D. did, Zoss replied, "Not if they have not been abused." Tr. Vol II at 47.

It is well settled that witnesses are absolutely forbidden from expressing an opinion as to the guilt or innocence of the accused, since this is solely a question of fact for the jury. *People v Row,* 135 Mich. 505, 507 (1904) An expert cannot be used as a human lie detector to give a stamp of scientific legitimacy to the truth or falsity of the allegations. See the case of *People v Izzo*, 90 Mich. App. 727 (1979).

Michigan Rule of Evidence 702 provides that

> "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert . . . , may testify in the form of an opinion or otherwise."

Both the federal and Michigan courts have condemned the misuse of police officers as experts. For instance, in *United States v Cruz*, 981 F.2d 659 (2nd Cir. 1992), the court reversed the defendant's drug and conspiracy convictions where a police officer testified as an expert to the behavior and modus operandi of drug dealers in the area, in order to bolster the testimony of a lead prosecution witness against the accused. The Court found that the expert testimony was improper under Federal Rule of Evidence 702.(9) For one, it was unnecessary. While recognizing that the operations of narcotics dealers could be a proper subject for expert testimony, the Court held that it had to be carefully circumscribed to occasions where the subject matter of the testimony is beyond the ken of the average juror. *Id.* 664. Moreover, the Court provided, "the credibility of a fact witness may not be bolstered by arguing that the witness's version of events is consistent with an expert's description of patterns of criminal conduct. . . ." *Id.* at 663.

The Michigan court condemned similar misuse of police expert testimony in *People v Hubbard*, 209 Mich. App. 234 (1995), a drug delivery case.

As in the above cases, the social worker in this case offered little opinions that were beyond the ken of the average juror and the dangers were that the jury would give her

opinions undue weight in resolving the determinations to be made in this case.

Note that she virtually answered the ultimate question. Tr. Vol. II at 47. The case of *People v Beckley*, 434 Mich. 691 (1990) said that an expert may testify that particular behavior of a child was characteristic of victims of sexual abuse but may not reach the issue of whether abuse in fact occurred.

> "To a jury recognizing the awesome dilemma of whom to believe, an expert will often represent the only seemingly objective source, offering it a much sought-after hook on which to hang its hat." 434 Mich. 691

Employing this opinion evidence was contrary to Michigan Rule of Evidence 403 since its probative value was substantially outweighed by the danger of unfair prejudice.

IV

Defendant Was Deprived of His Amendments V and XIV Rights of Due Process When Hearsay Evidence was Introduced.

As can be seen, virtually the entire testimony of social worker Zoss was hearsay. This is critical error since it is a third party corroboration of the children's testimony. Neither did it have the "equivalent circumstantial guarantees of trustworthiness" required by Michigan Rule of Evidence 803.

People v Welch, 226 Mich. App. 461 (1997) said such trustworthiness may be found where, *inter alia*, the statement

has some other reliability factors, such as personal knowledge and lack of bias of the declarant. Here, the former was absent and the latter may be presumed from the tone of the testimony. It is basic that hearsay is excluded. *Chambers v Mississippi*, 410 U.S. 284, 35 L. Ed.2d 297, 93 S.Ct. 1038.

Furthermore, the prosecutor introduced admission of Officer Moore's hearsay testimony that Petitioner threatened to rip out V.D.'s toenail again if she "told what happened" as an excited utterance. Defense counsel initially objected to this testimony as hearsay, but withdrew his objection before the trial judge ruled on it. Objection to this testimony as hearsay would not have prevented its admission; V.D.'s statement that her father had called her and threatened to rip her toenail out again if she told what happened, was not offered to prove the truth of that statement. This threatening statement was offered to show the effect of the statement on V.D., namely its intimidating effect on her ability and desire to testify.

Clinical social worker Robin Zoss had testified that D.D. told her that, on one occasion, her father had come into her room, gotten in bed with her, began touching her breasts and rubbing her back, and then got on top of her and put his penis into her vagina. Defense counsel objected after this testimony was offered on the ground that it was an improper report of Zoss's treatment. The trial judge overruled this objection. Tr. Vol. II at 41-42.

A proper hearsay objection might have kept this testimony from the jury.

V

Defendant Was Deprived of His Amendments V and XIV Rights of Due Process and His Am VIII Right to be Free from Unlawful Punishment Because the Trial Court Abused its Discretion in Imposing a 30 to 60 Year Sentence, a Sentence Defendant has No Reasonable Prospect of Serving. Such Sentence was Disproportionate.

Defendant, who was 39 at sentencing will have to live to be over 69 years of age before he would first be eligible for parole consideration, after first surviving 30 years in prison, and that is not a reasonable possibility. [See discussions below].

Defendant will have to live to be over 99 years of age before he can be discharged, absent parole consideration, after first surviving 60 years in prison. That too is not a reasonable possibility. An appropriate sentence could be achieved with a shorter sentence rather than putting him away practically for the rest of his life.

In *People v Moore*, 432 Mich. 311 (1989), the Michigan Supreme Court placed limits on the authority of a sentencing court to impose a term of years longer than the defendant's reasonable life expectancy. The Court held that a sentencing judge has the choice of sentencing a defendant convicted of an offense carrying a penalty of "life or any term of years" to either of those alternatives. However, if the Court chooses to impose a term of years, that term "must be an indeterminate sentence less than life. It must be something that is reasonably possible for a defendant actually to serve."

Id. at 319, 329. The Court held that when the interval between the defendant's minimum and maximum sentence is virtually certain to occur after the defendant's death, the sentence is not indeterminate.

Applying the principles of *Moore* to the case at bar Defendant should have been resentenced because the sentence imposed is not an indeterminate sentence which he "has a reasonable prospect of actually serving". His reasonable life expectancy is far less than the 30-plus years of age he would have to live to in order to serve a 30-year minimum sentence. This is especially true, when a person's life expectancy is generally considered to be far shorter in prison than general life expectancy tables might indicate. *People v Murray*, 72 Mich. 10 (1888); *Moore*, 329 n 17.

In *People v Rushlow*, 437 Mich. 149 (1991), it is acknowledged that the defendant had a reasonable chance of serving a sentence that would make him first eligible for parole at age 87.

It is submitted that the ordinary tables of mortality do not apply in a prison atmosphere.

Other panels of Michigan courts have criticized the reasoning and result in *People v Weaver*, 192 Mich. App. 231 (1991) and have stated had they not been bound to follow *Weaver* under Admin. Order 1990-6, they would have remanded for resentencing. These cases have held that a defendant did not have a reasonable prospect of serving a sentence into his early 90's. See the following cases:

People v LeMarbe (*After Remand*), 201 Mich. App. 45 (1993); *People v Martinez*, 193 Mich. App. 377 (1992); *Weaver*, 235-239 (Hood, J., dissenting); *People v Gist*, 190

Mich. App. 670 (1991); *People v Bell*, 190 Mich. App. 433 (1991) (Kelly, J., concurring); *People v Tyson (After Remand)*, 199 Mich. App. 62 (1993) (Kelly, J., dissenting)[1].

The only available statistics on prison longevity available come from the Michigan Department of Corrections Annual Statistical Report. According to the 1996 Annual Report, p. 110, [Age Breakdown of Total Population as of December 1996], out of 42,349 prisoners in all Department of Corrections facilities, there were only 12 prisoners alive over 80 years of age at the end of 1996. In contrast, 123 persons incarcerated in Michigan prisons died that year. *Id.*, p. 115.

While a Court may be hesitant to take on the task of determining how long a person may reasonably be expected to live in each case, the Michigan legislature has already made that determination for the courts, legislatively, in enacting statutory mortality tables. *See* MCL 500.834; MSA 24.1834. There, the Michigan Legislature specifically adopted a specific standard mortality table, which includes an "expectation of life" of persons of various ages. According to that table, a person of Defendant's age at the time of the

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[1] "It is inappropriate by any standard to continue to enforce sentences mandating death in prison by any reasonable sane analysis when the crimes for which the defendants have been convicted are not first-degree murder, and hence are not sanctionable by hard life in prison. I suggest that the appropriate sentence for each of these crimes is life, subject to possible parole after the legislatively mandated appropriate period within the reviewing structures of the parole board."

sentence, 39, had a life expectancy of approximately 33 years; not the 60 year maximum to which he was sentenced.

Without some statistical or factual support for the proposition that a 39 year old man had a reasonable prospect of living 30 years until past age 69 in a Michigan prison, neither this Court nor any Michigan court can conclude that Defendant has a reasonable prospect of serving the sentence imposed.

The issue is whether the sentence is disproportionate and an abuse of discretion. *People v Milbourn,* 435 Mich. 630 (1990).

The sentence offends the eighth amendment when there is an extreme disparity between the crime and the sentence. *U.S. v Hopper*, 941 F.2d 419, 422 (1991). Petitioner contends that is what occurred here.

In *Milbourn*, the court construed the law to require a harsher punishment where there was more harmful conduct by offenders with more serious prior records as contrasted with less aggravated conduct by less threatening offenders.

> "In our discussion of proportionality, we observed that the Legislature had determined to visit the stiffest punishment against persons who have demonstrated an unwillingness to obey the law after prior encounters with the criminal justice system. p. 668

Accordingly, this sentence is excessive when compared to the sentences of similar people who commit similar crimes. This sentence represents an abuse of

sentencing discretion under *Milbourn* in that it is disproportionate to the offense and the offender.

> This standard ". . . offers more effective protection against unjustified sentence disparity" than the former "shock the conscience" standard. *Milbourn*, at 649.

VI

Ineffective Assistance of Appellate Counsel

Petitioner was denied the effective assistance of appellate counsel in his attack on his convictions, because appellate counsel improperly delayed informing petitioner of the decision of the Michigan Court of Appeals, causing petitioner's subsequent failure to comply with the Michigan Supreme Court's fifty-six day rule in his appeal of the denial of his motion for relief from judgment.

Petitioner raises this claim to show cause for his procedural default in his attempt to appeal the trial court's denial of his motion for relief from judgment. Petitioner was procedurally defaulted in his attempt to appeal the Michigan Court of Appeals decision by failing to file papers in the Michigan Supreme Court seeking leave to appeal that decision within fifty-six days of the Court of Appeals order. The issues on which Petitioner procedurally defaulted are his claims that appellate counsel was ineffective for failing to raise Petitioner's claims of ineffective assistance of trial counsel in his appeal of right. Petitioner's motion for relief from judgment also challenged his sentence as disproportionate to his crimes. This issue was exhausted in Petitioner's appeal of right. Therefore, this issue is not procedurally defaulted.

Counsel failed to advise Petitioner of the adverse decision by the Michigan Court of Appeals decision until 14 months after the same was rendered thereby precluding an appeal to the Michigan Supreme Court. Petitioner learned of such decision when he received a letter from counsel on December 15, 1997 advising him that his appeal had been affirmed on October 24, 1996. His application for leave to appeal was subsequently returned as untimely by the Michigan Supreme Court. It was the Attorney's duty to properly inform the Defendant that he was denied in the Court of Appeals. Instead the Attorney allegedly told his partner to inform the Defendant by letter and apparently that did not happen.

> "If a habeas corpus petitioner is barred from presenting one or more of his claims to the state courts because of a procedural default, he has waived those claims for purposes of federal habeas corpus review unless he can demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error." *Rust v Zent*, 17 F.3d 155, 160 (6th Cir. 1994).

The District Court held that the procedural default constitutes an adequate and independent ground for barring habeas review since it is a default which occurred during Petitioner's attempt to appeal the trial court's denial of his motion for relief from judgment. That court stated that the United States Supreme Court has held that "the right to appointed counsel extends to the first appeal of right, and no further." *Pennsylvania v Finley*, 481 U.S. 551, 555 (1987). Consequently, the court held, Petitioner did not have a right to counsel during these post-conviction proceedings.

Petitioner contends that once the obligation of representation has been assumed Petitioner had a right to continued effective assistance of counsel.

Petitioner also contends that appellate counsel was ineffective in his appeal of right for failing to raise the noted above claims of dereliction on the part of trial counsel. The law regarding ineffective assistance by trial counsel is equally applicable here.

VII

Misconception of Evidence and Insufficient Evidence Claims

Petitioner contends that the trial judge misconceived the evidence against him concerning the charge that V.D. performed oral sex on him and that, absent this view of the evidence, there was insufficient evidence to support his conviction on this charge. Petitioner notes that the original transcript quoted D.D. as saying that she saw V.D. looking at Petitioner's penis. However, when considering Petitioner's motion for a directed verdict, the trial judge stated that D.D. had testified that she saw V.D. licking Petitioner's penis. Neither defense counsel nor Petitioner objected at the time that the trial judge's statement of the evidence was wrong. The court reporter subsequently corrected the transcript to state that D.D. saw V.D. licking at Petitioner's penis.

> "[T]he relevant question for the federal court in the habeas corpus proceeding is not whether it believes the evidence at the state trial established guilt beyond a reasonable doubt, but whether, after viewing the totality of the evidence in the light most favorable to

the prosecution, 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Brown v Davis*, 752 F.2d at 1147 (quoting *Jackson v Virginia*, 443 U.S. 307, 319 (1979)). V.D. did not corroborate the testimony of D.D.

VIII

Defendant Was Deprived of His Amendments V and XIV Rights of Due Process When Defendant Was Convicted Upon Insufficient Evidence.

The testimony of D.D., recorded in the disputed transcript, is the only testimony supporting the penetration element of Count II. [Fellatio by V.D.]

The *de novo* standard of review applies to claims of insufficiency of evidence, *U.S. v Canan*, 48 F.3d 954 (6th Cir. 1995), under a test that requires the reviewing court to view the evidence in the light most favorable to the prosecution and consider whether there was sufficient evidence to allow a rational trier of facts to find Defendant guilty beyond a reasonable doubt. *People v Wolf*, 441 Mich. 1201 (1992), *Jackson v Virginia*, 443 U.S. 307, 99 S.Ct. 2781; 61 L.Ed.2d 560 (1979), *People v Hampton*, 407 Mich. 354 (1979) *cert. denied* 449 U.S. 885 (1980).

In reviewing this issue, this Court must look for more than some evidence of a crime. The "any evidence" rule was rejected in *Hampton*.

If the improper testimony is disregarded, then the evidence presented at trial was insufficient to show that Defendant was guilty.

The Due Process Clause prohibits a criminal conviction unless the prosecution establishes guilt of the essential elements of a criminal charge beyond a reasonable doubt. See the case of *In re Winship*, 397 U.S. 358, 90 S.Ct 1068, 25 L.Ed.2d 368 (1970). The reasonable doubt requirement is a due process safeguard which was developed to protect citizens from "dubious and unjust convictions, which result in improper forfeitures of life, liberty and property". *Winship* at 362. As this court noted:

> "The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions resting on factual error. The standard provides concrete substance for the presumption of innocence -- that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'" *Winship* at 363.

Concededly, before a judgment of conviction may be set aside on the ground of insufficiency of the evidence, it must be made clearly to appear that under no hypothesis whatever is there sufficient substantial evidence to support the conclusion reached in the court below. The appellate court must view the evidence in a light most favorable to the judgment and must assume the existence of every fact reasonably deducible from the evidence. *People v Fowler*, 196 Cal.App.3d 79, 241 Cal. Rptr. 571 (1987)

IX

Trial Transcript Changed Without Notice or Hearing

As alluded to above, the transcripts were changed without notice and the Michigan Court of Appeals accepted an affidavit from the court reporter reflecting the change to correspond to what the judge said what V.D. allegedly said *looking* to *licking* at petitioner's penis.

The original trial transcript quotes D.D. as testifying that V.D. "was looking like at his penis." Tr. Vol. I at 129. However, an affidavit submitted by Debra Dickerson McGinnis, Official Court Reporter, states the original transcript stands corrected by an amended page attached to her affidavit. The amended page 129 and the affidavit are found at the beginning of the first volume of the trial transcript. The amended page 129 quotes D.D. as testifying that V.D. "was licking like at his penis." In her oral ruling denying Petitioner's motion for a directed verdict, the trial judge stated that, regarding Count II, "while [V.D.] did not provide the Court with information, the testimony from [D.D.] is that she saw [V.D.] person less than 13 years of age, lick the penis of Danny Ray Dunlap." Tr. Vol II at 52. No objection was made by defense counsel or Petitioner at that time that the trial judge had misstated or mischaracterized this testimony of D.D. which was the only testimony supporting the penetration element of Count II.

An accurate transcript is critical to an appeal since references in the parties' briefs to matters not in the record will not be considered. *Bilmar Drilling, Inc. v IFG Leasing Co.* 795 F.2d 1194 (5th Cir. 1986) Although each case of defective transcripts must be determined on its own facts and circumstances (*Wilson v State*, 334 Md. 469, 639 A.2d 696

(1994)) in certain circumstances, the original transcript may be so essential to meaningful appellate review that a remand for a new trial is necessary to insure a fair appeal. *Herndon v Massillon* 638 F.2d 963 (6th Cir. 1981).

X

Violation of Right to Counsel

The prosecutor and the Wayne County Sheriff's department violated the petitioner's right to counsel in June of 1988, by giving prisoner Lonnie Cummings a tape recorder in order to get petitioner to talk about the case he was on trial for. This is a violation of the fundamental right to counsel at a critical stage in the proceedings. [The factual basis for this claim is contained in a letter from Cummings filed in case 98 CV-71786DT, U.S. District Court Eastern District of Michigan, Southern Division.]

The right to counsel exists not only at trial, but at all "critical stages" of the prosecution, *i.e.*, stages where "counsel's absence might derogate from the accused's right to a fair trial," after initiation of adversary prejudicial proceedings (by way of formal charge, preliminary hearing, indictment, information or arraignment). *People v Bladel*, 421 Mich. 39 (1984), *aff'd* 475 U.S. 625 (1986). The right to counsel does not depend upon a request by the accused, and courts indulge in every reasonable presumption against waiver. *Bladel.*

XI

Petitioner believes he was incompetent at the time of trial

By verified pleadings filed in this cause Petitioner has stated that:

> The petitioner does not believe he was competent prior to trial and the course of trial. The petitioner suffers from bi polar manic depression and confusion. The petitioner is certain, because of this. It is more likely then unlikely that because of this situation the state took advantage of the petitioner because the petitioner did nothing to defend himself and in his mind simply expected it was a bad dream and some how his friends and his children would come to his rescue. Petitioner further states it has -- until the last few years been unable to fend for himself. All the petitioner can remember is his attorney had a report by two doctors stating confusion and memory problems. I know I was given a 200 question test by the court. I do not believe the examination was sufficient and because of this I was unable to assist my attorney.

Drope v Missouri, 420 U.S. 162, 181-82 (1975) held that due process violated when trial court failed to make further inquiry into defendant's competency and failed to give adequate weight to defendant's suicide attempt and pretrial showing of irrational behavior. *Id. U.S. v Hemsi*, 901 F.2d 293, 295-96 (2nd Cir. 1990), defendant is incompetent when behavior during competency hearing and testimony of expert

revealed defendant unable to cooperate rationally in own defense.

XII

Use of Unfair and Irrelevant Evidence

The prosecutor used unfair and irrelevant evidence concerning the alleged toenail incident to excite the jury and supply an explanation why V.D. would not testify against Petitioner. There was no competent evidence that the toenail incident ever occurred.

Police officer Laura Moore testified that V.D. showed Officer Moore her big toe. The toenail had been partially torn off. Over a defense hearsay objection, Officer Moore testified that V.D. told her that her father had torn her big toenail off with a pair of pliers. Tr. Vol. II at 6. The trial judge overruled defendant's hearsay objection, initially invoking the excited utterance rule (Tr. Vol. I at 184-85) but later admitting this hearsay testimony as a statement of the declarant's then existing physical or emotional condition. Tr. Vol. II at 6.

Officer Moore testified that V.D. told her she had recently spoken to her father on the telephone and that Petitioner had "told her if she told what had happened that he'd rip her toenail off again." Tr. Vol. II at 9.

Defense counsel made a hearsay objection before Officer Moore testified further, but withdrew it before the trial judge made a ruling. Tr. Vol. II at 8. This withdrawal of objection was error on his part. Hearsay is not permitted by Michigan law (Michigan Rule of Evidence 802) unless it

comes within one of the recognized exceptions, none of which are present here.

Even if relevant, evidence may be excluded if its probative value is outweighed by its prejudicial effect. *People v Lewis*, 97 Mich. App. 359 (1980), *rev'd on other grounds* 421 Mich. 229 (1984). [Introduction of evidence on a victim's infirmity held completely irrelevant to show that the victim could not defend himself or to show the defendant's malice.]

Unfair evidence has been construed to be evidence which has an undue tendency to suggest decision on an emotional basis. See the case of *People v Meadows*, 175 Mich. App. 355 (1989). The courts point out that prejudice arises where there exists a danger that evidence which is minimally relevant when evaluated in a logical manner may be given weight by a jury substantially out of proportion to its damaging effect. See the case of *People v Walker*, 167 Mich. App. 377 (1988). It is submitted that this is precisely what occurred here. The above referenced testimony must, in the ordinary sense of the occasion, have had a strikingly emotional impact upon the jury when Defendant was painted as a drug trafficker.

CONCLUSION

For the foregoing reasons, the petitioner respectfully prays that his petition for a writ of certiorari be granted.

The relevant question for the federal court in the habeas corpus proceeding is not whether it believes the evidence at the state trial establishes guilt beyond a reasonable doubt, but whether, after viewing the totality of the evidence in the light most favorable to the prosecution, any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

The judgment of the United States Court of Appeals for the Sixth Circuit should be reviewed by this Court because of the reasons hereinabove set forth. Errors that undermine confidence in the fundamental fairness of the state adjudication justify the issuance of the federal writ. *See, e.g.*, *Teague v Lane*, 489 U.S. 288 (1989). "Section 2254(d) requires us to give state courts' opinions a respectful reading, and to listen carefully to their conclusions, but when the state court addresses a legal question, it is the law 'as determined by the Supreme Court of the United States' that prevails." *Williams v John Taylor, Warden,* ___US ___ NO. 98-8384 at p. 8 (2000) 28 U.S.C § 2254

Respectfully submitted,

/s/_____

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Dated August 31, 1999]

No. 98-CV-71785-DT

DANNY RAY DUNLAP,
Petitioner,

v.

DENNIS STRAUB,
Respondent.

OPINION AND ORDER DENYING PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, Danny Ray Dunlap ("Petitioner"), presently confined at the G. Robert Cotton Correctional Facility in Jackson, Michigan, has filed this pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 alleging that he is confined in violation of his constitutional rights. In his application Petitioner challenges his convictions for two counts of first degree criminal sexual conduct, M.C.L. 750.520b(1)(b)(i) and 750.520(b)(1)(a), and three counts of

child cruelty, M.C.L. 750.136.[1] Petitioner was found guilty of the two counts of first degree criminal sexual conduct after a jury trial in the Detroit Recorder's Court. Petitioner pleaded guilty to the three counts of child cruelty. Petitioner was sentenced to concurrent sentences of thirty (30) to sixty (60) for the criminal sexual conduct convictions and two and a half to four years for the child cruelty convictions. For the reasons set forth below, Petitioner's application for a writ of habeas corpus is denied.

I. Background

A. Trial Facts

Petitioner was convicted after a jury trial of having sexual intercourse with his then thirteen year old daughter, D.D., and having fellatio performed upon him by his then five year daughter, V.D.. Petitioner's child cruelty convictions by guilty plea were based on his admission that he took nude and semi-nude suggestive photographs of D.D., V.D., and another daughter, then ten year old M.D. The photos came to the attention of the authorities when Petitioner tried to have them developed at a K-Mart.

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[1] Petitioner first challenged these convictions in a habeas application submitted in 1994. That application was dismissed without prejudice for failure to exhaust state court remedies. The transcripts of Petitioner's trial, guilty plea, and sentencing hearing are found in the records of that 1994 case, *Danny Dunlap v. William Grant*, 94-CV-70643-DT.

D.D testified at Petitioner's trial that, on December 19, 1987, Petitioner came into her bedroom about midday while she was dressed only in underpants and a shirt. She further testified that Petitioner laid in bed beside her and began rubbing her back, and then rubbed her breasts and vaginal area under her clothes. Petitioner then climbed on top of her and put his penis inside her vagina. Petitioner had intercourse with her briefly, but stopped, got up, and left the room abruptly after her mother opened the bedroom door and entered the room. D.D. further testified that her mother told Petitioner to get off her and that Petitioner replied that she was seeing things.

D.D also testified at trial that Petitioner had had intercourse with her before on several other occasions.

D.D. also testified that on Christmas Day 1987 she saw her sister V.D. perform oral sex on Petitioner. D.D. stated that on that day she went into her father's room. Her father was laying in bed under the covers. D.D. testified that she heard her sister V.D. giggling under the covers. When D.D. pulled the covers down, she saw V.D. licking at her father's penis[2]

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[2] The original trial transcript quotes D.D. as testifying that V.D. "was looking like at his penis." Tr. Vol. I at 129. However, an affidavit submitted by Debra Dickerson McGinnis, Official Court Reporter, states the original transcript stands corrected by an amended page attached to her affidavit. The amended page 129 and the affidavit are found at the beginning of the first volume of the trial transcript. The amended page 129 quotes D.D. as testifying that V.D. "was licking like at his penis." In her oral ruling denying Petitioner's motion for a directed verdict, the trial

Defense counsel impeached D.D.'s trial testimony that Petitioner had intercourse with her several times with her preliminary examination testimony that the December 19 incident had been the first and only time. Defense counsel also questioned D.D. concerning whether she had argued with Petitioner about a boy she had been seeing. D.D. testified that Petitioner called the boy a pimp and that she and Petitioner had argued about him. D.D. testified that Petitioner became jealous of the boy after allowing him to stay the night at their house. She stated that she had broken up with the boy a week or two before Petitioner had intercourse with her.

Defense counsel elicited an admission from D.D. that, prior to the trial, she had discussed her testimony with the prosecutor and had come into a court room and rehearsed her testimony in a witness stand. D.D. also testified that there were locks on the doors to her bedroom and her father's bedroom and that neither bedroom door was locked when the events she described occurred.

V.D. testified that she saw her father in his bedroom on Christmas Day. Despite repeated questioning, she testified that she could not remember what her father had asked her to

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judge stated that, regarding Count II, "while [V.D.] did not provide the Court with information, the testimony from [D.D.] is that she saw [V.D.] person less than 13 years of age, lick the penis of Danny Ray Dunlap." Tr. Vol. II at 52. No objection was made by defense counsel or Petitioner at that time that the trial judge had misstated or mischaracterized this testimony of D.D., which was the only testimony supporting the penetration element of Count II.

do that day. V.D. testified that she remembered showing Officer Laura Moore her foot and toenail. However, she testified that she could not remember what she told her about it. V.D. testified at trial that she was scared to testify about what she had told Officer Moore. Asked who she was scared of, she replied, "My dad." Tr. Vol. I at 156. Asked why, she stated, "My dad give me ugly looks." *Id.* at 158. She denied that anything had happened between her father and her on Christmas day.

Police officer Laura Moore testified that she had nineteen years experience investigating child neglect and sexual abuse cases. She interviewed V.D. on February 3, 1988. Officer Moore testified that V.D. was initially hesitant to talk to her. During this interview, V.D. showed Officer Moore her big toe. V.D. became very agitated and upset while removing her shoe and sock and showing her toe to Officer Moore. The toenail had been partially torn off. Over a defense hearsay objection, Officer Moore testified that V.D. told her that her father had torn her big toenail off with a pair of pliers. Tr. Vol. II at 6. The trial judge overruled defendant's hearsay objection, initially invoking the excited utterance rule, Tr. Vol. I at 184-85, but later admitting this hearsay testimony as a statement of the declarant's then existing physical or emotional condition. Tr. Vol. II at 6.

Officer Moore further testified that on February 17, 1988 she was talking with V.D. in the prosecutor's office concerning issuance of a warrant for Petitioner's arrest when V.D. "became very, hysterical" and "started crying uncontrollably." Tr. Vol. II at 7. Officer Moore testified that V.D. told her she had recently spoken to her father on the telephone and that Petitioner had "told her if she told what

had happened that he'd rip her toenail off again." Tr. Vol. II at 9. After Officer Moore's testimony that V.D. had begun crying uncontrollably, but before the testimony about Petitioner's threat to re-injure the toe, the trial judge asked the prosecutor where this inquiry was going. The prosecutor stated that she was laying a foundation to have the testimony admitted as an excited utterance, with the recent threatening phone call as the startling event. Defense counsel made a hearsay objection before Officer Moore testified further, but withdrew it before the trial judge made a ruling. Tr. Vol. II at 8.

Clinical social worker Robin Zoss, an expert in the treatment of child sexual abuse, testified that she was counseling and treating D.D. for possible sexual abuse and behavior problems. Zoss testified that D.D. told her that, on one occasion, her father had come into her room, gotten in bed with her, began touching her breasts and rubbing her back, and then got on top of her and put his penis into her vagina. Defense counsel objected after this testimony was offered on the ground that it was an improper report of Zoss's treatment. The trial judge overruled this objection. Tr. Vol. II at 41-42.

Robin Zoss also testified that child sex abuse victims often delay reporting having been sexually abused and also may under-report the number of times sexual abuse occurs. Zoss further testified that child sex abuse victims often display such symptoms as low self-esteem and self-abusive behaviors such as cutting themselves with sharp objects, burning themselves with cigarettes, and making suicide attempts, as well as abusing alcohol and drugs, and getting in trouble in

school, at home, and in the community. Some sexual abuse victims become promiscuous, others become afraid of sex.

Zoss further testified that D.D. manifested low self-esteem, particularly concerning her appearance, made two suicide attempts by cutting herself with scissors, abused alcohol and cigarettes, and got in trouble at home quite a bit. Asked by the prosecutor whether "any normal troubled teenager could exhibit these symptoms as well," Zoss replied, "They might exhibit one or two but not all of them, particularly not the self abuse symptoms." Tr. Vol. II at 46. Asked if "they," i.e., normal troubled teens, would exhibit such symptoms to the extent D.D. did, Zoss replied, "Not if they have not been abused." Tr. Vol. II at 47.

Defense counsel did not object to any of Zoss's testimony concerning D.D.'s symptoms or behavioral problems or their possible relationship to having been sexually abused. Defense counsel's cross-examination of Zoss consisted of reviewing Zoss's licensure to practice clinical social work in Michigan, eliciting an admission that Zoss was treating D.D. under the supervision of a psychiatrist named Dr. Brad Cline, and eliciting a reiteration of the testimony that D.D. had told Zoss that Petitioner had penile-vaginal intercourse with her in her bed. Defense counsel tried to get Zoss to agree that D.D. had said the sexual intercourse happened at night, which would have contradicted D.D.'s trial testimony, but Zoss replied that D.D. had only told her that it happened when she was in bed, but not what time it happened.

Justin Gould testified that he was a fifteen year old friend of the Dunlap family. He further testified that, when

Petitioner was no longer living with his family, Petitioner had asked him to write a letter to D.D. encouraging her to return to the Dunlap home and report that nothing had happened and that she had been threatened by the authorities investigating the charges against Petitioner. Gould testified that he wrote and sent the letter. The trial judge would not allow the letter to be admitted into evidence, because Petitioner did not write it. She did allow Gould to testify that Petitioner had asked him to write the letter and told him what to say in it.

Petitioner's wife, Mrs. Vairley Dunlap, testified that she saw D.D. and Petitioner in Petitioner's bedroom on December 19, 1988. She further testified that Petitioner and D.D. were wrestling on the floor and that they were both completely dressed. Mrs. Dunlap testified that Petitioner did walk around the house naked at times, but insisted he was dressed on the date in question when she saw him with D.D. in the bedroom.

Defense counsel informed the court that, after discussing the matter with counsel, Petitioner had decided not to testify. The trial judge informed Petitioner that he had the right to testify if he wanted to and that; conversely, if he did not want to testify, he did not have to and the jury would be instructed that it was not to consider his silence in any way and that it could draw neither adverse nor favorable inferences from his decision not to testify. Petitioner replied that he understood. The trial judge informed Petitioner that if he decided not to testify at that time, he would have no opportunity to testify in his trial. Petitioner replied that he understood. The trial judge then asked Petitioner if he wanted to testify. Petitioner replied that he did not want to testify. The defense did not call any witnesses.

Defense counsel argued in closing that D.D.'s testimony was not credible and was motivated by anger at Petitioner for disciplining her. Defense counsel cited the discrepancy between D.D.'s preliminary examination and trial testimony regarding whether Petitioner had intercourse with her more than once as evidence of her lack of credibility. Defense counsel argued that the accounts of V.D.'s statements that Petitioner had ripped out her toenail and threatened to do it again were perhaps a distorted account of some unfortunately misguided parental discipline. Defense counsel argued that Robin Zoss's testimony left room for reasonable doubt because she was working under the supervision of a psychiatrist and the psychiatrist did not testify. Defense counsel maintained that the fact that the bedroom doors had been left unlocked in both instances of alleged sexual penetration cast doubt on whether the sexual contacts actually happened. Finally, defense counsel argued generally (without any specific details asserted) that the inculpatory statements offered by D.D. might have been the result of suggestion and rehearsal.

The jury, deliberated for about ten minutes before being excused for lunch. After returning from lunch, the jury deliberated for less than an hour and a half before finding Petitioner guilty of both counts of first degree criminal sexual conduct. Tr. Vol. II at 112-115. Later the same day, Petitioner pleaded guilty to three counts of child cruelty.

B. Procedural History

Petitioner appealed as of right his convictions and sentences. The Michigan Court of Appeals affirmed the judgment on Petitioner's first-degree criminal sexual conduct

convictions and sentences and his convictions and sentences for child cruelty. *People v. Danny Ray Dunlap,* Michigan Court of Appeals Nos. 111207, 112546 (December 12, 1990). Petitioner raised the following issues in his appeal of right. First, he challenged the admission of V.D.'s hearsay statements about the injury to her big toe and Petitioner's threat to re-injure the toe. The Court of Appeals found that the first statement concerning the big toe injury was properly admitted as a statement concerning an existing mental, emotional, or physical condition under M.R.E. 803(2). The statement concerning Petitioner's threat to re-injure the toe was not objected to at trial and the appellate court found that no manifest injustice would result from not considering this issue. Second, Petitioner contended that D.D.'s hearsay statements related by social worker Zoss were improperly admitted. The appellate court found that defendant either failed to object, or failed to state the specific grounds for objecting to this testimony at trial. The appellate court further found that this failure precluded appellate review and that no manifest injustice would result from not considering this issue. Third, Petitioner contended that no evidence of penetration was presented concerning the count involving V.D.. The appellate court found otherwise, citing D.D.'s testimony, as set forth in the trial judge's recitation of the evidence in her ruling denying the motion for a directed verdict and in the corrected version of her testimony. Fourth, Petitioner challenged the testimony of Robin Zoss concerning the rape trauma syndrome and her opinion testimony that D.D.'s symptoms were consistent with those of a person who had been sexually abused. The appellate court found that this claimed error was not properly before the court because the defense had not objected to this testimony at trial. Fifth, Petitioner attacked his thirty to sixty year sentence as

improper under Michigan law because it was a sentence he could not reasonably be expected to be able to serve. The appellate court denied this claim, noting that Petitioner was thirty-nine at sentencing and stating that there was no reason he would not be able to serve the thirty year minimum sentence. Sixth, Petitioner attacked his convictions of child cruelty as arising under an unconstitutionally vague and overbroad statute. The appellate court rejected this claim on the merits.

The Michigan Supreme Court denied Petitioner's delayed application for leave to appeal the denial of his appeal of right. *People v. Danny Ray Dunlap,* Michigan Supreme Court No. 90877, 90878 (August 31, 1991).

Petitioner next filed a petition for a writ of habeas corpus in this Court on February 18, 1994. That petition raised the same issues that had been presented in his appeal of right, plus two additional, unexhausted issues. The petition was therefore dismissed without prejudice for failure to exhaust state court remedies. *Danny Dunlap v. William Grant,* 94-CV-70643-DT (E.D.Mich.) (March 9, 1995).

On or about April 3, 1995 Petitioner a motion for relief from judgment in the trial court. The trial court denied this motion. Petitioner, acting through retained counsel, subsequently appealed the denial of this motion to the Michigan Court of Appeals. Petitioner's appeal asserted that Petitioner's first appellate counsel had been ineffective for failing to argue that ineffective assistance of trial counsel had caused the various procedural defaults that the Michigan Court of Appeals had noted in its denial of Petitioner's appeal of right. Petitioner also challenged his thirty to sixty, year

sentence as disproportionate under *People v. Milbourn,* 435 Mich. 630 (1990). The Michigan Court of Appeals denied Petitioner's delayed application for leave to appeal for failure to meet the burden of establishing entitlement to relief under M.C.R. 6.508(D). *People v. Danny R. Dunlap,* Michigan Court of Appeals No. 197181 (October 29, 1996).

On or about December 17, 1997 Petitioner filed a pro per delayed application for leave to appeal in the Michigan Supreme Court. The Michigan Supreme Court informed Petitioner by letter that it would not accept his submission for filing, because it had been filed more than fifty-six days after the date of the Court of Appeals decision. M.C.R. 7.302(C)(3). See. Letter of Corbin R. Davis to Petitioner, dated April 2, 1998.

The Court has carefully reviewed the petition. Petitioner sets forth his claims as fifteen separate issues. However, many of these issues are repetitious assertions of Petitioner's asserted grounds for relief supporting his claim that he was denied the effective assistance of trial counsel. Therefore, the Court shall consolidate discussion of the petition by reviewing the following grounds:

> I. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS COLLATERAL ATTACK ON HIS CONVICTIONS, BECAUSE APPELLATE COUNSEL IMPROPERLY DELAYED INFORMING PETITIONER OF THE DECISION OF THE MICHIGAN COURT OF APPEALS, CAUSING PETITIONER'S

SUBSEQUENT FAILURE TO COMPLY WITH THE MICHIGAN SUPREME COURT'S FIFTY-SIX DAY RULE IN HIS APPEAL OF THE DENIAL OF HIS MOTION FOR RELIEF FROM JUDGMENT; APPELLATE COUNSEL WAS ALSO INEFFECTIVE FOR FAILING TO CHALLENGE PETITIONER'S GUILTY PLEA CONVICTION ON THREE COUNTS OF CHILD CRUELTY.

II. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF TRIAL COUNSEL IN HIS CRIMINAL SEXUAL CONDUCT TRIAL ON NUMEROUS GROUNDS, PARTICULARLY WHERE TRIAL COUNSEL FAILED TO ADEQUATELY OBJECT TO PREJUDICIAL HEARSAY AND OPINION EVIDENCE WHICH WAS IMPROPERLY ADMITTED AND DEPRIVED PETITIONER OF A FAIR TRIAL, AND FAILED TO UTILIZE A LETTER PURPORTEDLY WRITTEN BY D.D.

III. PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL IN HIS APPEAL OF RIGHT BY APPELLATE COUNSEL'S FAILURE TO PRESENT INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL AS GROUNDS FOR RELIEF.

IV. PETITIONER WAS DENIED DUE PROCESS BY THE TRIAL JUDGE'S MISSTATEMENT OF TRIAL TESTIMONY; ABSENT THE TRIAL JUDGE'S MISSTATEMENT OF THE EVIDENCE, THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT PETITIONER'S CONVICTION OF THE SECOND COUNT OF FIRST DEGREE CRIMINAL SEXUAL CONDUCT.

V. THE CHILD CRUELTY CHARGES TO WHICH PETITIONER PLEADED GUILTY WERE BASED ON AN UNCONSTITUTIONAL STATUTE AND PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL CONCERNING THESE CHARGES.

VI. PETITIONER'S THIRTY TO SIXTY YEAR SENTENCE FOR FIRST DEGREE CRIMINAL SEXUAL CONDUCT IS DISPROPORTIONATE TO HIS CRIME AND PRIOR RECORD.

For the reasons stated below, the petition for a writ of habeas corpus is denied.

II. Standard of Review

Petitioner's application was filed after April 26, 1996; therefore, his petition is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996, 28

U.S.C. § 2254(d) ("AEDPA"). The AEDPA has significantly amended the habeas statute and sets forth new standards of review for federal courts to apply when addressing petitions for writs of habeas corpus. First, a federal court must determine whether the petitioner challenges a question of law, a question of fact, or a mixed question of law and fact. *Harpster v. State of Ohio,* 128 F.3d 322, 326 (6th Cir. 1997). A federal court must apply the presumption of correctness to state court findings of fact for habeas corpus purposes unless convincing evidence is offered to rebut this presumption. *Warren v. Smith,* 161 F.3d 358, 360-361 (6th Cir. 1998); 28 U.S.C. 2254(e)(1).

If the challenge involves only a question of fact, § 2254(d)(2) applies and the federal court can grant habeas relief only "if the state court's decision 'was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Harpster v. State of Ohio,* 128 F.3d at 326. Moreover, a state court determination of a factual issue is to be presumed correct and the petitioner can rebut the presumption only by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1).

If however, a petitioner challenges a decision based only on a question of law, then the first clause of § 2254(d)(1) applies and "a federal court may grant habeas relief only if it determines that a state court's decision rested on a legal determination that was 'contrary to . . . clearly established Federal law, as determined by the Supreme Court.'" *Harpster v. State of Ohio,* 128 F.3d at 326 (quoting *Drinkard v. Johnson,* 97 F.3d 751, 768 (5th Cir. 1996), *cert. denied,* 520 U.S. 1107 (1997)).

Finally, if the challenge is one that presents a mixed question of law and fact, then the second clause of § 2254(d)(1) applies and a federal court should grant relief only if the state court decision was "an unreasonable application of . . . clearly established Federal Law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). A deferential review-of state court judgments for reasonableness is only required on mixed questions of fact and law. *Id.*

The degree of deference to the state courts' judgments required under the AEDPA is a question of reasonableness. A habeas court can only grant a writ when "a state court's application of clearly established Supreme Court precedent will not be debatable among reasonable jurists [because] it is so offensive to existing precedent, so devoid of record support, or so arbitrary, as to indicate that it is outside the universe of plausible, credible outcomes." *Nevers v. Killinger,* 169 F.3d 352, 362 (6th Cir. 1999) (citing *Drinkard v. Johnson*, 97 F.3d 751,769 (5th Cir. 1996), *cert. denied,* 520 U.S. 1107 (1997); *Tucker v. Prelesnik*, 1999 WL 374105 (6th Cir. (Mich.)).

III. Discussion

A. Claim of Ineffective Assistance of Appellate Counsel in State Collateral Attack

This claim is not an independent substantive claim challenging the legality of Petitioner's convictions. Rather, Petitioner raises this claim to try to show cause for his procedural default in his attempt to appeal the trial court's denial of his motion for relief from judgment. Petitioner

procedurally defaulted his attempt to appeal the Michigan Court of Appeals decision by failing to file papers in the Michigan Supreme Court seeking leave to appeal that decision within fifty-six days of the Court of Appeals order. The issues on which Petitioner procedurally defaulted are his claims that appellate counsel was ineffective for failing to raise Petitioner's claims of ineffective assistance of trial counsel in his appeal of right.[3]

Petitioner did not submit his papers seeking leave to appeal the adverse decision of the Michigan Court of Appeals affirming the trial court's denial of his motion for relief from judgment within fifty-six days of the Court of Appeals decision. Consequently, Petitioner procedurally defaulted his claims. M.C.R. 7.302(C)(3). The Michigan Supreme Court's refusal to file and consider Petitioner's application for leave to appeal for failure to comply with the fifty-six day rule of M.C.R. 7.302(C)(3) is an independent and adequate state procedural bar to habeas review. *O'Sullivan v. Boerckel,* 119 S.Ct. 1728 (1999); *Leroy v. Marshall,* 757 F.2d 94, 99-100 (6th Cir. 1985); *Seeger v. Straub,* 29 F.Supp. 2d 385, 391 (E.D. Mich. 1998).

"If a habeas corpus petitioner is barred from presenting one or more of his claims to the state courts because of a procedural default, he has waived those claims for purposes of federal habeas corpus review unless he can

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[3] Petitioner's motion for relief from judgment also challenged his sentence as disproportionate to his crimes. This issue was exhausted in Petitioner's appeal of right. Therefore, this issue is not procedurally defaulted.

demonstrate cause for the procedural default and actual prejudice resulting from the alleged constitutional error." *Rust v. Zent,* 17 F.3d 155, 160 (6th Cir. 1994). To establish cause the petitioner must present a substantial reason to excuse the default. Cause must be something that cannot be attributed to the petitioner.

Petitioner has argued that ineffective assistance of appellate counsel in the appeal from the denial of his motion for relief from judgment caused his procedural default. However, ineffective assistance cannot provide cause for Petitioner's procedural default.

The procedural default which this Court has found constitutes an adequate and independent ground for barring habeas review is a default which occurred during Petitioner's attempt to appeal the trial court's denial of his motion for relief from judgment. The United States Supreme Court has held that "the right to appointed counsel extends to the first appeal of right, and no further." *Pennsylvania v. Finley,* 481 U.S. 551, 555 (1987). Consequently, Petitioner did not have a right to counsel during these post-conviction proceedings. Because Petitioner did not have a right to counsel in these proceedings, he did not have a right to the effective assistance of counsel and cannot claim that ineffective assistance is legally acceptable cause for his procedural default. *Wainwright v. Torna,* 455 U.S. 586 (1982); *Ewing v. McMackin,* 799 F.2d 1143, 1151 (6th Cir. 1986); *Gentry v. Trippett,* 956 F.Supp. 1320, 1326 (E.D. Mich. 1997).

Petitioner has not made any other specific allegation as to why he did not comply with the Michigan Supreme Court's fifty-six day rule. Petitioner's "pro se status and [possible]

ignorance of his rights do not constitute cause excusing his failure to raise grounds before the state courts." *Hannah v. Conley,* 49 F.3d 1193, 1197 (6th Cir. 1995). Furthermore, in any event, Petitioner has shown sufficient sophistication to require him to comply with M.C.R. 7.302(C)(3).

Therefore, the Court concludes that Petitioner has failed to show cause for his state procedural default.

The United States Supreme Court held in *Murray v. Carrier,* 477 U.S. at 495, that "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." See also, *Schlup v. Delo,* 513 U.S. 298, 318-22 (1995). Petitioner cannot show that he is actually innocent. Petitioner's daughter D.D. testified that Petitioner had sexual intercourse with her and that she saw her younger sister perform oral sex upon Petitioner. V.D. testified that she was afraid of Petitioner. Petitioner seriously injured V.D. and threatened to do so again in an attempt to intimidate her. Social worker Robin Zoss testified that D.D.'s behavior was consistent with that of an adolescent who had been sexually abused. Petitioner did not testify and the defense called no witnesses. Petitioner has made no showing that he is probably actually innocent.

For the reasons stated above, Petitioner's procedural default bars this Court from granting habeas relief. Petitioner has not shown cause for his default. Petitioner also cannot show prejudice from his claimed constitutional errors. Respondent has addressed the merits of Petitioner's claims, despite raising a procedural default defense. The question of

whether prejudice has been shown is inextricably entangled with the merits of Petitioner's ineffective assistance of trial counsel claims. Therefore, the Court shall directly address the merits of those claims.

B. Ineffective Assistance of Trial Counsel Claims

Petitioner claims that trial counsel was ineffective for 1) failing to object to testimony by Officer Laura Moore about Petitioner's threat to re-injure V.D.'s toe, 2) failing to timely and properly object to Robin Zoss's hearsay testimony relating D.D.'s statement that Petitioner had sexual intercourse with her, 3) failing to object to Robin Zoss's opinion testimony, and 4) failing to use a letter purportedly written by D.D. to challenge her credibility.

In order to establish ineffective assistance of counsel, petitioner must show that counsel's deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. at 691-692. First, the petitioner must show that counsel's performance was deficient and "fell below an objective standard of reasonableness." *Id.* at 687-688. Petitioner also must show that counsel's deficient performance prejudiced the defense. This requires the petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. The court must assess the ineffective assistance claim in relation to the evidence of petitioner's guilt. The reviewing court "must consider the totality of the evidence before the judge or jury. . . . a verdict or conclusion only weakly supported by the record is more likely to have been affected

by errors than one with overwhelming record support." *Strickland v. Washington,* 466 U.S. at 695-696.

A claim of ineffective assistance of counsel is a mixed question of law and fact. *Strickland v. Washington,* 466 U.S. 668, 698 (1984). Therefore, this Court may grant habeas relief on petitioner's ineffective assistance of counsel claim only if the Michigan Court of Appeals' decision was an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(I).

The prosecutor sought admission of Officer Moore's hearsay testimony that Petitioner threatened to rip out V.D.'s toenail again if she "told what happened" as an excited utterance. Defense counsel initially objected to this testimony as hearsay, but withdrew his objection before the trial judge ruled on it. Objection to this testimony as hearsay would not have prevented its admission. V.D.'s statement that her father had called her and threatened to rip her toenail out again if she told what happened was not offered to prove the truth of that statement. Petitioner was not charged with an assault based on having injured V.D.'s toe. Nor was he charged with threatening to do so, or intimidating a witness. This threatening statement was offered to show the effect of the statement on V.D., namely its intimidating effect on her ability and desire to testify. "Here, the testimony was elicited by the prosecutor [] to show the complaining witness's reasonable apprehension of danger and thereby rehabilitate her testimony." *People v. Lee*, 391 Mich. 655, 666 (1974).

Consequently, this testimony was not barred by the hearsay rule.[4]

Because Officer Moore's testimony concerning Petitioner's threat to re-injure V.D.'s toe was not offered to prove the facts asserted therein, a hearsay objection would have been futile. Therefore, trial counsel was not ineffective for withdrawing his hearsay objection. Consequently, Petitioner cannot show that he was prejudiced by his procedural default of failing to present this claim to the Michigan Supreme Court in a timely manner.[5]

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[4] If this testimony had been offered to prove the truth of the matter asserted, it likely would have been admissible as an excited utterance. An excited utterance is "a statement relating to a startling event or condition made while the declarant was under the stress or excitement caused by the event or condition." M.R.E. 803(2). It is unclear how much time lapsed between the time when Petitioner made this telephonic threat to V.D. and she related it to Officer Moore. However, Officer Moore testified that V.D. was hysterical and crying uncontrollably when she told her about Petitioner's threat to re-injure her toe. "[T]ime lapse will not alone render an excited utterance inadmissible so long as the declarant is still under the stress of the excitement caused by the event." *People v. Verberg*, 170 Mich. App. 490, 495 (1988). The record indicates that V.D. was still under the stress of the excitement caused by Petitioner's threatening phone call when she told Officer Moore about it.

[5] Officer Moore had previously testified over a defense hearsay objection that V.D. showed her injured big toe to her and told Officer Moore that Petitioner had pulled the toenail off it with a pair of pliers. That testimony was admitted as a statement of the declarant's then existing physical or emotional condition pursuant

Petitioner claims that trial counsel was ineffective for failing to oppose as inadmissible hearsay social worker Robin Zoss's testimony that D.D. told her she had intercourse with Petitioner in her bedroom. After this testimony was given, defense counsel objected to this testimony as an improper report of Zoss's treatment.[6] This objection was overruled: In its denial of Petitioner's appeal of right the Michigan Court of Appeals found that the defense had failed to object or failed to state the specific grounds for objection. The court ruled that failure to consider the issue would not result in a manifest injustice.

A hearsay objection might have kept this testimony from the jury.[7] However, the Michigan Court of Appeals

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to M.R.E. 803(3). In its opinion denying Petitioner's appeal of right, the Michigan Court of Appeals found that admission of this testimony on this basis was proper. This was not an unreasonable ruling by the Michigan Court of Appeals, as the testimony clearly related to the declarant's contemporaneous emotional, mental, and physical condition. Furthermore, this statement was not offered to prove the truth of the contents of the statement, but rather, only to show that the declarant said it. Therefore, it was not subject to exclusion as hearsay. *United States v. Gibson,* 675 F.2d 825, 833-34 (6th Cir. 1982). Petitioner does not contend that trial counsel was ineffective in his opposition to admission of this testimony.

[6] Defense counsel may have thought this testimony was being improperly offered as a statement made in connection with a medical diagnosis or in connection with treatment. M.R.E. 803(4).

[7] Social worker Zoss's testimony that D.D. told her she had sexual intercourse with her father may or may not have been

decision that failure to consider this issue would not result in a manifest injustice was not unreasonable. Zoss's testimony that D.D. told her Petitioner had intercourse with her was cumulative to D.D.'s testimony. Hence, it was far less important than if it had been the only source of the allegations contained in it. The defense contended in cross-examination and argument that D.D.'s allegations were the result of revenge-motivated fabrication. Zoss's testimony that D.D. had told her about her allegations did not prevent the development of this defense. Furthermore, both Zoss and D.D. were available for cross-examination concerning these allegations. Therefore, admission of Zoss's testimony did not violate Petitioner's right under the due process clause of the Fourteenth Amendment to defend against the state's accusations, *Chambers v. Mississippi*, 410 U.S. 284 (1973) or implicate his right under the confrontation clause of the Sixth Amendment to confront his accuser.

Petitioner cannot show that there is a reasonable probability, that the result of his trial would have been different if this evidence had been excluded by a hearsay objection. The other evidence of Petitioner's guilt - D.D.'s testimony, the evidence of his injury, of V.D. and his threat

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admissible as a prior consistent statement to rebut an allegation of fabrication. Zoss began treating D.D. on April 13, 1998, so D.D.'s statement to Zoss must have been made on or after that date. Tr. Vol. II at 39. That was after February 3, 1988, the date that Officer Laura Moore first met with D.D. about the case. Tr. Vol. I at 180. However, the record does not indicate on what date D.D. first made her allegation that Petitioner had intercourse with her. *People v. Verburg*, 170 Mich. App. 490, 497 (1988).

to re-injure her, and Zoss's properly admitted opinion testimony – was very strong. Therefore, Petitioner cannot show that he was prejudiced by failing to present this claim to the Michigan Supreme Court in a timely manner.

Petitioner contends that trial counsel was ineffective for failing to object to social worker Robin Zoss's opinion testimony. Zoss testified both about sexual abuse and its victims generally and about D.D.'s case in particular. Zoss testified that sexual abuse victims often delay reporting the abuse. They may be confused about its importance, attempt to deny its occurrence or importance, or be concerned that reporting it will break up their family. For similar reasons, victims often mentally block out periods of time or instances of abuse. Consequently, abuse victims may underreport the number of instances of abuse. They often initially deny that abuse occurred. Zoss also testified that sexual abuse victims often have very low self-esteem. They may be self-abusive, cutting themselves with sharp objects or burning themselves with cigarettes. They may be suicidal, abuse drugs or alcohol, frequently get into trouble at school, at home, or in the community, or become promiscuous.

Zoss testified that she was treating D.D. for behavioral problems and suspected sexual abuse. Zoss stated that D.D. had low self-esteem, particularly concerning her appearance, that she had made two suicide attempts with scissors, abused alcohol and cigarettes, and was often in trouble at home. Zoss was asked by the prosecutor if these behaviors might not be exhibited by any normal, but troubled teenager. Zoss replied: "They might exhibit one or two but not all of them, particularly the self-abuse symptoms." Tr. Vol. II at 46. Asked if a troubled teen would exhibit these behaviors to the

extent D.D. had, Zoss replied, "Not if they have not been abused." *Id.* at 47.

The Michigan Court of Appeals found that Petitioner's attack on Zoss's opinion testimony was not properly before the court because it was not objected to at trial. Petitioner contends that this failure to object constituted ineffective assistance of trial counsel. This Court disagrees for two reasons. First, under Michigan's evidentiary law concerning such testimony, an expert is permitted to testify whether a complainant's post-incident behavior was consistent with that person being an incest victim for the purpose of rebutting claims that it was not. The expert is not to testify as to the complainant's credibility, or whether in fact she was an incest victim. *People v. Beckley,* 161 Mich. App. 120 (1987), *affirmed, People v. Beckley,* 434 Mich. 691 (1990); *People v. Peterson,* 450 Mich. 349 (1995). Zoss did not explicitly testify concerning D.D.'s credibility, or that she was in fact an incest victim. Although "a jury could reasonably infer that [Zoss], who testified that she had personally examined the complainant for purposes of diagnosis and treatment, was, at the very least, predicting that the complainant in fact had been sexually abused," *People v. Beckley,* 434 Mich. at 750 (Archer, J., dissenting), the Michigan courts have not barred such testimony. Therefore, it was not deficient performance for Petitioner's counsel to fail to object to this testimony.

Consequently, Petitioner cannot show that he was prejudiced by his failure to present this claim to the Michigan Supreme Court in a timely manner.

Petitioner contends that trial counsel was ineffective for failing to use a letter purportedly written by D.D. to

challenge her credibility. This claim fails because it was a matter of trial tactics whether to use the purported letter from D.D. The letter, which is dated February 8, 1998, states that D.D. loves and misses her father, hopes to return to his custody, and that the police threatened her and M.D. It is true that trial counsel could have tried to impeach D.D. with the letter, asserting that it was inconsistent with her allegations of sexual assault. However, it is also true that Justin Gould testified that, upon Petitioner's request, he had encouraged D.D. to write just such a letter. Furthermore, the letter does not recant either of D.D.'s specific allegations of sexual penetration. Reasonable choices of trial strategy and tactics made after thorough investigation "are virtually unchallengeable." *Strickland,* 466 U.S. at 690. Petitioner cannot show that trial counsel's decision not to utilize the letter purportedly written by D.D. was deficient performance, or that failing to use this letter prejudiced the defense.

Therefore, Petitioner cannot show that failure to timely present this claim to the Michigan Supreme Court prejudiced him.

Petitioner has not shown that any of his ineffective assistance of trial counsel claims have merit.

III. Ineffective Assistance of Appellate Counsel

Petitioner contends that appellate counsel in his appeal of right for failing to raise the above claims of ineffective assistance of trial counsel. The Court has found that Petitioner's ineffective assistance of trial counsel claims lack merit. Therefore, failure to present these claims in Petitioner's appeal of right was not ineffective assistance of

appellate counsel. *Jones v. Barnes,* 463 U.S. 745 (1983); *Grubbs v. Singletary,* 900 F.Supp. 425 (M.D. Fl. 1995).

IV. Alleged Misstatement of the Evidence and Insufficient Evidence Claims

Petitioner contends that the trial judge misstated the evidence against him concerning the charge that V.D. performed oral sex on him and that, absent this misstatement of the evidence, there was insufficient evidence to support his conviction on this charge. Petitioner notes that the original transcript quoted D.D. as saying that she saw V.D. looking at Petitioner's penis. However, when considering Petitioner's motion for a directed verdict, the trial judge stated that D.D. had testified that she saw V.D. licking Petitioner's penis. Neither defense counsel nor Petitioner objected at the time that the trial judge's statement of the evidence was wrong. The court reporter subsequently corrected the transcript to state that D.D. saw V.D. licking at Petitioner's penis.

The trial judge's ruling is supported by the corrected transcript and affidavit submitted by the court reporter. It is also supported by the absence of objection or protest by defense counsel or Petitioner when it was announced in open court. Petitioner has not rebutted the factual determination made by the trial judge with clear and convincing evidence. Consequently, that determination is presumptively correct and is binding upon the Court. 28 U.S.C. § 2254(e)(1); *Lundy v. Campbell,* 888 F.2d 467, 469 (6th Cir. 1989), *cert. denied,* 495 U.S. 950 (1990); *Spalla v. Foltz,* 615 F. Supp. 224, 227 n. 3 (E.D. Mich. 1985).

"[T]he relevant question for the federal court in the habeas corpus proceeding is not whether it believes the evidence at the state trial established guilt beyond a reasonable doubt, but whether, after viewing the totality of the evidence in the light most favorable to the prosecution, '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Brown v. Davis,* 752 F.2d at 1147 (quoting *Jackson v. Virginia,* 443 U.S. 307, 319 (1979)). D.D. testified that she saw V.D. licking at Petitioner's penis. V.D. did not corroborate this testimony. However, V.D. did testify that she was afraid of Petitioner because he was giving her ugly looks. Evidence was properly admitted that Petitioner had injured V.D. and threatened to re-injure her to discourage her from testifying. This Court concludes that the evidence was sufficient for a reasonable jury to find beyond a reasonable doubt that V.D. performed oral sex upon Petitioner. Therefore, there was sufficient evidence to support Petitioner's conviction on this count of first degree criminal sexual conduct. *People v. Camon*, 110 Mich. App. 474, 487 (1981), *lv. den.* 414 Mich. 859 (1982).

V. Claims Concerning Child Cruelty Charges

Petitioner claims that his child cruelty convictions are based on an unconstitutional statute and that he received ineffective assistance of counsel concerning these charges. These claims are not properly before this Court, because Petitioner is no longer in custody for these convictions.

A federal court may only entertain a petition for habeas corpus on "behalf of a person *in custody* pursuant to the judgment of a State court only on the ground that he is *in custody* in violation of the Constitution or laws or treaties of

the United States." 28 U.S.C. § 2254(a) (emphasis added). When a sentence is fully expired, a habeas petitioner is no longer "in custody" for that offense and thus cannot file an application for habeas relief from that conviction. *Carafas v. LaVallee.*, 391 U.S. 234, 238 (1968). A prisoner need not be physically confined in order to challenge his sentence on habeas corpus. The United States Supreme Court has "never held however, that a habeas petitioner may be 'in custody' under a conviction when the sentence imposed for that conviction has *fully expired* at the time his petition is filed." *Maleng v. Cook*, 490 U.S. 488, 491 (1989) (*per curiam*).

"The federal habeas statute gives the United States District Courts jurisdiction to entertain petitions for habeas relief only from persons who are '*in custody* in violation of the Constitution or laws or treaties of the United States.'" *Maleng v. Cook,* 490 U.S. at 490 (quoting 28 U.S.C. § 2241(c)(3), emphasis supplied by the Supreme Court). The United States Supreme Court has ruled that prisoner who is serving consecutive sentences is in custody for all of those sentences in the aggregate, and may attack the sentence scheduled to run first, even after it has expired, until all of the consecutive sentences have been served. *Garlotte v. Fordice,* 515 U.S. 39 (1995).

Petitioner was sentenced in 1988 to concurrent sentences of thirty to sixty years for the criminal sexual conduct convictions and two and a half to four years for the child cruelty convictions. All of these sentences were concurrent. Therefore, Petitioner has fully served his child cruelty, sentences and these sentences have not lengthened his total aggregate sentence. Invalidation of his child cruelty, sentences would not "advance the date of his eligibility for

release from present incarceration." *Id.* at 47. Consequently, Petitioner is not "in custody" for these convictions and his claims challenging them will not be considered.

VI. Challenge to Sentence

Petitioner challenges the legality of his thirty to sixty year sentence.

The United States Supreme Court limited review of allegedly disproportionate sentences in *Harmelin v. Michigan,* 501 U.S. 957, 965 (1991). The Supreme Court ruled that a mandatory, life sentence without possibility of parole for a first offense of possession with intent to distribute more than 650 grams of cocaine was not cruel and unusual punishment prohibited by the Eighth Amendment. Following *Harmelin*, the Sixth Circuit has ruled that "there is no requirement of strict proportionality; the eighth amendment is offended only by an extreme disparity between crime and sentence." *United States v. Hopper,* 941 F.2d 419, 422 (1991).

The Michigan appellate courts ruled that imposing Petitioner's thirty to sixty year sentence was not an abuse of discretion under Michigan law and did not violate the principle of proportionality under *People v. Milbourn,* 435 Mich. 630 (1990). This ruling under Michigan sentencing law cannot be the basis of habeas corpus relief, because federal habeas corpus is not available for attacks on alleged violations of state law or procedures. *Estelle v. McGuire,* 502 U.S. 62 (1991); *Pulley v. Harris,* 465 U.S. 37, 41 (1984). Federal habeas corpus is not available for alleged error in the interpretation or application of state sentencing law. *Thomas*

v. Foltz, 654 F.Supp. 105, 107 (E.D. Mich. 1987); *Atkins v. Overton,* 843 F.Supp. 258, 260 (E.D. Mich. 1994).

Furthermore, this Court notes that the minimum sentence ranges of Michigan's sentencing guidelines are not binding or mandatory. Only the *use* of the guidelines to determine the sentence is mandatory. The sentencing judge may impose a sentence above the guidelines if she states her reasons for doing so. *Thomas v. Foltz, supra.* Petitioner was sentenced to a minimum sentence longer than the guideline recommended minimum sentence. The judge explained that she was sentencing Petitioner above the guidelines because his criminal activity persisted over a long period of time, he grossly underestimated the seriousness of his conduct and its effect on his children, and he was a dangerous person. Petitioner had no right to have the state sentencing guidelines applied absolutely or mechanically. Furthermore, even if Petitioner had such a right, there is no evidence that the Michigan appellate courts erred in upholding the sentencing court's upward deviation from the guidelines.

Petitioner does not claim that his sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment. Even if Petitioner raised such a claim, it would not merit habeas relief, because the United States Supreme Court has upheld a determinate sentence longer than Petitioner's minimum sentence for a crime much less serious than Petitioner's. See *Hutto v. Davis,* 454 U.S. 370 (1982) (*per curiam*) (holding that a forty year sentence for possession with intent to deliver nine ounces of marijuana did not violate the Eighth Amendment). Additionally, the Sixth Circuit has held that the Eighth Amendment does not require strict proportionality between crime and sentence; rather, "the

eighth amendment is offended only by an extreme disparity, between crime and sentence." *United States v. Hopper,* 941 F.2d 419, 422 (1991). The maximum penalty for first degree criminal sexual conduct in Michigan is imprisonment for life or any term of years. M.C.L. 750.520b. Hence, Petitioner's sentence does not exceed the statutory limit. It also does not violate the Eighth Amendment's constitutional prohibition against grossly or extremely disproportionate punishment.

Consequently, for the above stated reasons, this Court concludes that 1) to the extent Petitioner challenges his sentence under Michigan state sentencing law, his claim is not a federal constitutional claim cognizable in federal habeas corpus and 2) Petitioner has not shown that the decision of the Michigan appellate courts decisions to uphold his thirty to sixty year sentence were contrary, to, or unreasonable applications of, applicable federal constitutional precedent. Therefore, Petitioner's claims attacking his sentence are denied.

VI. Conclusion

For all of the above-stated reasons, the petition is denied.

Accordingly, based upon the foregoing,

IT IS HEREBY ORDERED that the petition for a writ of habeas corpus is DENIED WITH PREJUDICE.

/s/_____
AVERN COHN
UNITED STATES DISTRICT JUDGE

DATED: AUG 31 1999

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[Dated September 23, 1999]

No. 98-71785

DANNY RAY DUNLAP,
Petitioner,

v.

DENNIS STRAUB,
Respondent.

ORDER DENYING CERTIFICATE OF APPEALABILITY

Petitioner is appealing the Order denying his application for a writ of habeas corpus under 28 U.S.C. 2254 and requests a certificate of appealability. There are no grounds asserted in the Notice of Appeal. Review of the order denying the application suggests that the issues raised by the application do not make out a substantial showing of the denial of a constitutional right.

Accordingly, the request is DENIED.

SO ORDERED.

/s/_____
AVERN COHN
United States District Judge

Dated: SEP 23 1999

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[Filed May 2, 2000]

No. 99-2085

DANNY RAY DUNLAP,
Petitioner-Appellant,

v.

DENNIS STRAUB,
Respondent-Appellee.

ORDER

Before: GUY, BOGGS, and SUHRHEINRICH, Circuit Judges.

Danny Ray Dunlap, a pro se Michigan prisoner, petitions this court to reconsider its order of February 22, 2000, denying an application for a certificate of appealability. *See* Fed. R. App. P. 22(b).

After careful consideration, the panel concludes that the court did not act under any misapprehension of law or fact in issuing its order. *See* Fed. R. App. P. 40(a).

Accordingly, the petition for rehearing is DENIED.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk